

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD TYLER FRAZER,)	CASE NO. C12-5856-RSL-MAT
)	
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting)	APPEAL
Commissioner of Social Security, ¹)	
)	
Defendant.)	

Plaintiff Richard Tyler Frazer proceeds *pro se* in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be AFFIRMED.

¹ Carolyn W. Colvin, Acting Commissioner of Social Security, is substituted as defendant in this suit. Fed. R. Civ. P. 25(d)(1).

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1973.² He completed high school and three years of college (AR 38, 125), and last worked, in 1998, as a landscaper (AR 38, 107-08, 111).

Plaintiff filed applications for SSI and DIB in November 2007, alleging disability since December 31, 1996. (AR 96-105.) His applications were denied initially and on reconsideration, and he timely requested a hearing.

ALJ Verrell Dethloff held a hearing on August 26, 2009, taking testimony from plaintiff. (AR 34-45.) On February 10, 2010, the ALJ rendered a decision finding plaintiff not disabled. (AR 19-29.)

The Appeals Council denied plaintiff's request for review on July 20, 2012 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since December 31, 1996, the alleged onset date.

At step two, it must be determined whether a claimant suffers from a severe impairment.

² Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 The ALJ found plaintiff's major depressive disorder, pain disorder, status post left knee
02 surgery, right shoulder strain, and partial sacralization of the lumbar spine severe. Step three
03 asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found
04 plaintiff's impairments did not meet or equal the criteria of a listed impairment.

05 If a claimant's impairments do not meet or equal a listing, the Commissioner must
06 assess residual functional capacity (RFC) and determine at step four whether the claimant has
07 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC
08 to perform light work, with the ability to lift ten pounds frequently and twenty pounds
09 occasionally, and to walk and stand for about six hours in an eight-hour day. He could
10 occasionally: reach, push, or pull overhead with the right arm; climb ladders, ropes, and
11 scaffolds; and stoop, kneel, crouch, and crawl. He should avoid exposure to extreme cold and
12 concentrated exposure to vibration. Plaintiff could perform simple and some detailed tasks,
13 but not complex tasks, and manage to have the superficial interaction required of everyday life,
14 including relating to coworkers and supervisors. With that RFC, the ALJ found plaintiff
15 unable to perform any past relevant work.

16 If a claimant demonstrates an inability to perform past relevant work or has no past
17 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the
18 claimant retains the capacity to make an adjustment to work that exists in significant levels in
19 the national economy. With consideration of the Medical-Vocational Guidelines, the ALJ
20 concluded plaintiff's limitations would not have a significant effect on his ability to perform
21 unskilled work, and that the Guidelines directed a finding of not disabled. The ALJ found
22 plaintiff was not under a disability from December 31, 1996 through the date of the decision.

01 This Court's review of the ALJ's decision is limited to whether the decision is in
02 accordance with the law and the findings supported by substantial evidence in the record as a
03 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
04 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
05 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
06 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
07 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
08 F.3d 947, 954 (9th Cir. 2002).

09 Plaintiff challenges the ALJ's decision as related to his SSI claim. (*See* Dkt. 24 at 3.)
10 The only specific assignment of error raised consists of a challenge to the ALJ's consideration
11 of the opinion of examining physician Dr. Mark Heilbrunn. (Dkt. 24.) *See generally*
12 *Carmickle v. Commissioner*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address
13 issues not argued with any specificity) (citing *Paladin Assocs., Inc. v. Mont. Power Co.*, 328
14 F.3d 1145, 1164 (9th Cir. 2003) (the court "ordinarily will not consider matters on appeal that
15 are not specifically and distinctly argued in an appellant's opening brief").) Plaintiff requests
16 remand for an award of benefits. The Commissioner argues the ALJ's decision is supported
17 by substantial evidence and should be affirmed.

18 Opinions of Dr. Mark Heilbrunn

19 Plaintiff avers an absence of evidence Dr. Heilbrunn reviewed x-ray evidence revealing
20 abnormalities in his spine (*see* AR 220), and maintains the ALJ erred in relying almost entirely
21 on the report from Dr. Heilbrunn. Plaintiff takes issue with various aspects of Dr. Heilbrunn's
22 report, stating, for example, that he told Dr. Heilbrunn he was in pain during a straight-leg

01 raising test, denying the physician had the ability to identify an absence of muscle atrophy in a
02 single examination, and offering his own interpretation of the medical evidence. Plaintiff also
03 points to a lumbar spine MRI post-dating the ALJ's decision (AR 221-23) and submitted to the
04 Appeals Council, and submits to this Court Washington State Department of Health Medical
05 Quality Assurance Commission disciplinary records pertaining to Dr. Heilbrunn (Dkts. 24-1 &
06 24-2). However, for the reasons explained below, plaintiff fails to identify error in the ALJ's
07 decision.

08 The ALJ noted that the only examinations in the record were associated with plaintiff's
09 disability claim, and concluded the examinations did not reveal findings indicative of a
10 disabling impairment. (AR 24.) He described the December 2007 report of Dr. Heilbrunn in
11 detail, including plaintiff's report "he could lift 50 pounds, was not limited in walking or
12 standing, and could negotiate steps and uneven terrain[.]" and the findings of "some crepitus in
13 the left knee; tenderness to palpation in the lower back and right shoulder; and limited range of
14 motion in the back, left knee, and right shoulder based on subjective pain complaints." (*Id.*
15 (discussing AR 185-90).) He noted: "Lumbar spine x-rays showed partial sacralization at L5
16 with pseudoarthrosis of the right transverse process of the sacral base." (*Id.* (citing AR 191).)

17 The ALJ further stated:

18 However, the abnormalities shown in the x-ray cause few, if any, observed
19 functional limitations on examination. Dr. Heilbrunn found that the claimant
20 had no problems bending over to take off his pants, socks, and shoes. He had
21 no difficulty getting on and off the examination table, sitting up from a supine
22 position, or performing a full crouch. He exhibited a negative straight leg raise
test and his gait, station, motor strength, and sensation were all normal. Dr.
Heilbrunn found no evidence of nerve root impingement.

(*Id.*, internal citation to record omitted.)

01 The ALJ accorded significant weight to Dr. Heilbrunn's opinions as to plaintiff's
02 limitations, finding them consistent with his objective findings. (AR 25 (noting Dr. Heilbrunn
03 found plaintiff had moderate impairment regarding frequent and overhead reaching with right
04 arm, could sit five to six hours and stand/walk six hours, and could lift and carry thirty to forty
05 pounds with either hand on frequent basis).) He also gave significant weight to the opinions of
06 a state agency consultant who reviewed the record, finding them "generally consistent with the
07 findings and opinions of Dr. Heilbrunn." (*Id.*) The ALJ's RFC assessment corresponds with
08 the assessment of the state agency consultant. (*See id.* and AR 192-200.)

09 "[T]he ALJ is responsible for determining credibility, resolving conflicts in medical
10 testimony, and for resolving ambiguities." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
11 1998) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). *Accord Carmickle*, 533
12 F.3d at 1164; *Thomas*, 278 F.3d at 956-57. The ALJ must support his findings with "specific,
13 cogent reasons." *Reddick*, 157 F.3d at 722 (citing *Rashad v. Sullivan*, 903 F.2d 1229, 1231
14 (9th Cir. 1990)). When evidence reasonably supports either confirming or reversing the ALJ's
15 decision, we may not substitute our judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d
16 1094, 1098 (9th Cir. 1999). *Accord Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599
17 (9th Cir. 1999) ("Where the evidence is susceptible to more than one rational interpretation, it is
18 the ALJ's conclusion that must be upheld.") (citing *Andrews*, 53 F.3d at 1041).

19 Plaintiff's contention as to an absence of evidence Dr. Heilbrunn reviewed the x-ray
20 evidence is not well taken. The copies of the x-ray results show that they were ordered by and
21 sent to Dr. Heilbrunn. (AR 191 & 220.) Moreover, the record in this case contains no opinion
22 evidence contrary to that relied upon by the ALJ in relation to plaintiff's physical impairments.

01 While plaintiff takes a contrary view of the evidence, he fails to demonstrate the ALJ's
02 interpretation and acceptance of the medical opinion evidence, or any other evidence in the
03 record, was not rational. Also, as discussed below, the ALJ provided clear and convincing
04 reasons for finding plaintiff less than fully credible.

05 Plaintiff's reliance on evidence submitted to the Appeals Council is likewise unavailing.
06 The Court considers the evidence submitted to the Appeals Council in determining whether
07 there is substantial evidence support for the ALJ's decision. *Brewes v. Comm'r of Soc. Sec.*
08 *Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012). Plaintiff submitted several medical records to
09 the Appeals Council, and here maintains a June 2010 MRI of the lumbar spine constitutes
10 reliable objective evidence medically verifying his claims and the causes of his back pain.
11 (AR 5-6, 217-23.) The MRI findings include mild and mild to moderate degenerative disc
12 changes, "[s]mall broad-based disc bulge[s,]" annular fissures, an absence of spinal canal or
13 neural foraminal narrowing, "contact and possible slight impingement of the left L3 nerve root
14 by disc bulge," and "[p]rominent L5 transverse processes on the right . . . closely apposed to the
15 adjacent sacral ala with resultant subchondral reactive changes." (AR 222-23.)

16 In arguing error in relation to this evidence, plaintiff points, in particular, to the
17 evidence of possible nerve root impingement/compression. However, the ALJ acknowledged
18 the existence of a severe back impairment and associated objective evidence in the record, but
19 found a lack of evidence any abnormalities caused functional limitations on examination. (AR
20 21, 24). The ALJ nonetheless assessed a variety of physical limitations to account for
21 plaintiff's impairments and found plaintiff's testimony as to the degree of his limitation not
22 credible to the extent inconsistent with that assessment. (AR 23-24.) While the MRI adds

01 additional objective evidence to the record, it remains that there is an absence of support for a
02 finding that plaintiff's back impairment imposes functional limitations greater than that
03 assessed by the ALJ. The Court further observes that the MRI reflects "mild" and "mild to
04 moderate" changes, "small" disc bulges, and only "possible slight" impingement of the nerve
05 root. (AR 222-23.) Even with consideration of this evidence, the ALJ's decision has the
06 support of substantial evidence.

07 Finally, plaintiff does not demonstrate error by pointing to State disciplinary records.
08 The documents are not a part of the record. Nor can it reasonably be said that documents
09 showing Dr. Heilbrunn faced State disciplinary charges in 1999, was subjected to probation,
10 and was reinstated in 2001 (Dkts. 24-1 & 24-2), are in any respect material to this matter. *Cf.*
11 42 U.S.C. § 405(g) ("The court . . . may at any time order additional evidence to be taken
12 before the Commissioner . . . , but only upon a showing that there is new evidence which is
13 material and that there is good cause for the failure to incorporate such evidence into the record
14 in a prior proceeding[.]") Instead, as argued by the Commissioner, the documents are
15 irrelevant to the consultative examination Dr. Heilbrunn conducted in 2007, and the ALJ
16 properly considered and relied upon evidence from this licensed physician. 20 C.F.R. §§
17 404.1513(a)(1), 416.913(a)(1) (licensed physicians are acceptable medical sources who can
18 provide evidence to establish the existence of an impairment).)

19 In sum, plaintiff fails to demonstrate error in the ALJ's consideration of Dr. Heilbrunn's
20 opinions. The ALJ's decision has the support of substantial evidence.

21 Credibility

22 As stated above, the only specific assignment of error raised by plaintiff related to the

01 ALJ's consideration of the evidence from Dr. Heilbrunn. However, while the Court ordinarily
02 only considers issues argued with specificity, *Carmickle*, 533 F.3d at 1161 n.2, it finds it
03 prudent to also consider the possibility that plaintiff challenges the ALJ's assessment of his
04 credibility. For the reasons described below, the Court finds no error in that assessment.

05 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
06 reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)
07 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). See also *Vertigan v. Halter*,
08 260 F.3d 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must
09 identify what testimony is not credible and what evidence undermines the claimant's
10 complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "In weighing a claimant's
11 credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his
12 testimony or between his testimony and his conduct, his daily activities, his work record, and
13 testimony from physicians and third parties concerning the nature, severity, and effect of the
14 symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.
15 1997).

16 In this case, the ALJ concluded that, while plaintiff's impairments could reasonably be
17 expected to cause some symptoms, his testimony was consistent with the RFC. He noted, for
18 example, plaintiff's testimony that "he has spent time with various friends and that he traveled
19 100 miles to Astoria, Oregon last year to accompany a friend to Costco." (AR 24.) The ALJ
20 concluded other testimony as to the intensity, persistence, and limiting effects of plaintiff's
21 symptoms was not credible to the extent inconsistent with the assessed RFC. (*Id.*)

22 The ALJ found the medical record to support the RFC assessment, explaining there was

01 no evidence plaintiff “received, or even attempted to obtain, treatment for his alleged physical
02 and mental symptoms.” (*Id.*) He noted that, although plaintiff testified to lacking health
03 insurance or financial resources to obtain treatment, “the record does not show that he made any
04 attempt to use resources such as low or no cost clinics or hospital emergency rooms[,]” and that
05 the only examinations were associated with his pursuit of disability benefits. (*Id.*)

06 An ALJ appropriately considers an unexplained or inadequately explained failure to
07 seek treatment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (ALJ permissibly
08 inferred that the claimant’s pain was not as disabling as alleged “in light of the fact that he did
09 not seek an aggressive treatment program and did not seek an alternative or more-tailored
10 treatment program after he stopped taking an effective medication due to mild side effects.”)
11 *See also* Social Security Ruling (SSR) 96-7p (ALJ should not draw inferences from failure to
12 seek or pursue treatment without first considering explanations for that failure, including an
13 inability to afford treatment). “[A] claimant’s failure to assert a good reason for not seeking
14 treatment, ‘or a finding by the ALJ that the proffered reason is not believable, can cast doubt on
15 the sincerity of the claimant’s pain testimony.’” *Molina v. Astrue*, 674 F.3d 1104, 1113-14
16 (9th Cir. 2012) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

17 The ALJ in this case appropriately considered plaintiff’s failure to seek treatment and
18 found insufficient his explanation for that failure. Neither plaintiff’s assertion that he has
19 “sublimated the symptoms of his impairment, so as to not over-burden his mother[,]” or the fact
20 that he once visited an emergency room (Dkt. 26 at 5-6) undermines the ALJ’s reasoning.

21 The ALJ next found that the examinations in the record did not produce findings
22 indicative of a disabling level of impairment, first discussing evidence from Dr. Heilbrunn, as

01 described above. (AR 24-25.) The ALJ also described evidence from an examining
02 psychologist, including testing results, and found the “well written” correspondence from
03 plaintiff in the record, including analysis and discussion of case law and regulations, to also
04 support a finding that plaintiff had “few, if any, cognitive limitations.” (*Id.*) The ALJ,
05 therefore, properly considered both a lack of objective evidence support, and inconsistent
06 evidence in the record. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (“While
07 subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated
08 by objective medical evidence, the medical evidence is still a relevant factor in determining the
09 severity of the claimant’s pain and its disabling effects.”), SSR 96-7p (same), and *Carmickle*,
10 533 F.3d at 1161 (“Contradiction with the medical record is a sufficient basis for rejecting the
11 claimant’s subjective testimony.”) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.
12 1995)).

13 Finally, the ALJ pointed to evidence of plaintiff’s daily activities. He described
14 plaintiff’s testimony that “he is limited by pain but can sometimes perform household chores
15 such as sweeping, preparing meals, and washing dishes[,]” and his statement to Dr. Heilbrunn
16 that “he could undertake all household activities and that he was not limited in walking or
17 standing.” (AR 25 (citing AR 185).) The ALJ also again noted that plaintiff drove 100 miles
18 to assist a friend shopping at Costco. (*Id.*)

19 Plaintiff denies inconsistency, describes Dr. Heilbrunn’s statement as hearsay, and
20 avers his statements at hearing merely specify his household activities. He describes the
21 Costco incident as isolated, and explains he was unable to participate in daily activities for
22 several days after this incident due to pain and fatigue.

01 The ALJ appropriately considered both inconsistency in plaintiff's statements and
02 evidence of his daily activities. See SSR 96-7p ("One strong indication of the credibility of an
03 individual's statements is their consistency, both internally and with other information in the
04 case record.") and *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ
05 appropriately considers inconsistencies or contradictions between a claimant's statements and
06 activities of daily living). As stated by the Ninth Circuit:

07 While a claimant need not "vegetate in a dark room" in order to be eligible for
08 benefits, the ALJ may discredit a claimant's testimony when the claimant
09 reports participation in everyday activities indicating capacities that are
10 transferable to a work setting. Even where those activities suggest some
difficulty functioning, they may be grounds for discrediting the claimant's
testimony to the extent that they contradict claims of a totally debilitating
impairment.

11 *Molina*, 674 F.3d at 1112-13 (citations omitted). Plaintiff fails to demonstrate any error in the
12 ALJ's consideration of evidence as to his statements or daily activities.

13 As described above, the ALJ provided several clear and convincing reasons for finding
14 plaintiff less than fully credible. The credibility assessment should, therefore, be upheld.

15 **CONCLUSION**

16 For the reasons set forth above, this matter should be AFFIRMED.

17 DATED this 13th day of June, 2013.

18
19 

20 Mary Alice Theiler
21 United States Magistrate Judge
22